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[*Saporito v. Florida Power & Light Co.*](#), 89-ERA-7 and 17 (ALJ June 30, 1989)

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U.S. Department of Labor
Office of Administrative Law Judges
John W. McCormack Post Office
and Courthouse
Room 409
Boston, Massachusetts 02109

DATE: June 30, 1989

CASE NOS.: 89-ERA-7
89-ERA-17

IN THE MATTER OF

Thomas J. Saporito, Jr.
Complainant

v.

Florida Power and Light Company,
Respondent

Appearances:

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West Palm Beach, FL 33401
For Complainant

Thomas J. Saporito, Jr.
Pro Se, on brief

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Counsel for Union Employee-Witnesses

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Before: Anthony J. Iacobo
Administrative Law Judge

Recommended Decision and Order Denying Complaint

This is a proceeding under the Energy Reorganization Act of 1974, as amended, (Act) 42 U.S.C. § 5851 and the implementing regulations found in 29 Code of Federal Regulations Part 24, whereby employees of employers subject to the Act and regulations may file complaints and receive certain redress upon a showing of being subjected to discriminatory action resulting from protected activity. The hearing in this proceeding was held in Miami, Florida, on February 1 through 3 and February 9, 10, 13 and 14, 1989. The parties¹ appeared and were given the opportunity to present evidence and argument.² Briefs were received by June 2, 1989.

Procedural History

These cases stem from complaints dated October 14, 1988, (89-ERA-7) and November 28, 1988, and subsequent dates (89-ERA-17) by Mr. Thomas J. Saporito, Jr., lodged with the Employment Standards Administration, Wage and Hour Division, of the U.S. Department of Labor (DOL) alleging he was subjected to harassment, discriminatory conduct and ultimately dismissal by Respondent, Florida Power and Light Company, (FPL), because of certain activity protected by section 5851(a)(1-3) of the Act. In the absence of any evidence as to the date of mailing, the complaints shall be deemed filed as of the dates they bear. 29 CFR 24.3(b). The initial complaint alleged that Mr. Saporito was the subject of discrimination and harassment as a result of a communication sent to the Nuclear Regulatory Commission (NRC) on September 29, 1988 "regarding a series of events concerning a management person at the nuclear plant." RX 75. This matter was investigated by the Wage and Hour Division and found to be without merit on November 18, 1988. The determination was timely appealed by Complainant and was given the docket number 89-ERA-7.

On November 28, 1988 a second letter of complaint was

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sent by Saporito to the Wage and Hour Division alleging safety concerns to the NRC by Complainant on November 20 and 23, 1988. Then followed three other complaints by Mr. Saporito dated (a) December 6th, alleging harassment and discrimination for further protected activity, letters to the NRC dated December 2nd and 5th, (b) December 16th, complaining of FPL's efforts to submit him to a medical examination as retribution for protected activity and (c) on December 20th and 23rd, 1988 complaining of being discharged (at first suspended without pay until further notice) allegedly as retribution for his protected activity. These latter complaints were treated as one by the Wage and Hour Division which concluded on January 10, 1989 that the allegations were valid, ordered Mr. Saporito be made whole and that he also be awarded \$100,000.00 in compensatory damages. Complainant appeals, seeking \$500,000.00 in compensatory damages. Respondent seeks dismissal of the complaints. This matter was assigned docket Not 89-ERA-17. This proceeding embraces and shall dispose of both docketed cases.

Basic Issue

The basic issue in these cases is whether the Complainant, because of protected activity, was the subject of prejudicial actions and ultimately dismissal by his employer, FPL.

Preliminary Observations

The Act specifically requires an individual to file a complaint within thirty days of the occurrence of the alleged violation in order to obtain redress. 42 U.S.C. § 5851(b)(1), 29 CFR 24.3(b). Accordingly, only those allegedly improper activities by FPL within 30 days of October 14, 1988 are embraced within the initial complaint. Any subsequent actions would be embraced by either the initial or the subsequent complaints.

In its brief, FPL notes that the United States Court of Appeals, Fifth Circuit, has held that an employee's activity, to be protected, must involve communication with a government entity. *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984). This rule is contrary to what I

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believe to be the majority rule and contrary to the position taken by the Department of Labor. *Kansas Gas & Electric Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985), *Mackowick v. University Nuclear Systems, Inc.*, 735 F.2d 1159, (9th Cir. 1984). The issues shall be treated on this premise, although I shall distinguish between Complaint's communications to governmental and non-governmental agencies:

Stipulations

The parties stipulated that:

At all times relevant to the instant complaints, Complainant, Thomas J. Saporito, Jr., was an employee of Respondent, FPL, within the meaning of Section 210 of the Act, 42 U.S.C. § 5851.

Respondent, FPL, is an employer within the meaning of the Act.

Respondent is a licensee of the Nuclear Regulatory Commission (NRC).

Complainant was hired by FPL in the job classification of Instrument & Control Specialist.

Complainant began working for Respondent on March 8, 1982.

Throughout Complainant's employment with Respondent, Complainant worked in job classifications covered by the collective bargaining agreement entered into by FPL and the International Brotherhood of Electrical Worker's AFL-CIO (IBEW). That collective bargaining agreement contained a grievance procedure, ending in binding arbitration.

Complainant's job history with Respondent includes work at several FPL power plants, both fossil fuel and nuclear powered. As here pertinent, he worked at Turkey Point Power Plant (nuclear) from April 13, 1985 to June 22, 1985, from August 24, 1985 to February 1, 1986, and from June 6, 1987 to June 20, 1987.

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He worked at the St. Lucie Power Plant (nuclear) from June 20, 1987 to April 23, 1988 as an Instrument and Control Specialist-Nuclear until he voluntarily transferred to Turkey Point in the same capacity on April, 23, 1988. Respondent discharged Complainant on December 22, 1988. The validity or lack of validity of the matters raised by Complainant in 1988 to the NRC regarding plant safety is not at issue in this proceeding. The parties also stipulated as to the dates of nineteen different items of correspondence Complainant mailed to one or various agencies. Among these, a letter sent to the Institute of Nuclear Plant Operations (INPO), a private industry group, the NRC and DOL. The letter to INPO was sent on May 9, 1988 and received by FPL the same day. The first letter to FPL with a copy to NRC was sent and received on September 29, 1988. There then followed a series of letters to either NRC or DOL, or both, within short intervals from October 31st to December 28, 1988.

Summary of the Facts

I

The summary is based on the findings and conclusions I have reached after hearing the testimony and observing the demeanor of the witnesses and reviewing the transcript and exhibits of record. References to appropriate segments of the record shall be as follows:

TR for transcript of the hearing, CX for Complainant's exhibits, RX for Respondent's exhibits, CB for Complainant's brief and RB for Respondent's brief Since nearly all of the events embraced in this brief. Since nearly all of the events embraced in this proceeding transpired in the year 1988, the month and date alone shall be generally used in referring to various events taking place in 1988.

Complainant was first employed by FPL in 1982. FPL is a licensee of the NRC. As here pertinent, it operates nuclear power plants in St. Lucie County and Turkey Point (Dade County), Florida. Complainant, during, 1988 and for some time prior thereto, resided in Jupiter, Florida, described as about two and one-half hours away from the Turkey Point plant. TR 232. Obviously, traffic conditions will affect; the driving time. TR 782. I take official

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notice that the distance is well in excess of 100 miles. In April 1988 he successfully bid, on the basis of the FPL-IBEW bargaining agreement, on a job at Turkey Point. Having been stationed at Turkey Point in the past, there was some anticipation of his arrival by those who knew him. Mr. Jerard Harley, the I & C Production Supervisor, had been an I & C Technician and a Job Steward for the Union in 1985 and 1986. TR 1726. He and Complainant had worked together for about four months at St. Lucie in late 1985 and early 1986. During this period he had lived in Saporito's home on a mutually convenient basis. Harley had the use of a bedroom in Complainant's home and he provided transportation for Complainant in return. TR 1727. He was not pleased to learn Saporito was going to work in his shop, believing him. to be a "non-worker". Harley considered him a threat to his efforts to improve production and made various adverse statements about Saporito's imminent arrival. TR 1730-1. Ms. Loretha Mathis, an I & C Specialist at Turkey Point and a Job Steward at the time, also knew Complainant from his past stints at Turkey Point. She had been called upon to complete jobs originally assigned to Saporito which he had, for one reason or another, failed to complete. TR 560-3. In her view, Saporito's return was regarded by the employees as "an event". TR 573-4.

It was in this setting that on the first day he was due to report to Turkey Point, Saporito called in sick. TR 231. Shortly thereafter, he challenged the failure of management to include his telephone number in Jupiter on the "call-out" list, the list used to summon employees for emergency or overtime work. Tr 232-3, 1884-5. He also requested a long distance telephone access number to use to call home for personal-business use, if he was required to perform unscheduled overtime, for example. This, too, after some debate involving union stewards was denied. TR 234-5, 1330-1, 1885-6.

During this same early period Complainant is alleged to have made derogatory racial remarks regarding Ms. Mathis. TR 1734. Whether this took place or was aided and abetted by Harley is unclear because Mathis and the other union employees who may have some knowledge of the affair concluded it was an intraunion matter resolved within that organization. They refused to discuss the matter, except to

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show that management was attempting to use it as a spear on which to impale Complainant. TR 517-520. This was allegedly in contrast to management's relative indifference when she had complained about somewhat similar episodes, involving others in the past. TR 521, 584. As I noted on the record in, conjunction with Mathis' testimony as well as that of Mr. Robert Boyle, the Chief Steward; and others, I am not going to give any probative weight to their testimony regarding this aspect of the case because I do not believe a witness should be allowed to pick and choose the areas about which he or she will testify. TR 557-8, 238-242. Further, it clouds the reliability of their testimony generally.

In addition to the foregoing, the first couple of weeks of Complainant's arrival at Turkey Point also included an alleged infraction of the rules regarding notification to plant management that one is out sick. Saporito called in one morning and, before having seen a physician, advised the FPL answering machine he would be out sick that day and the next. He later offered to present a physician's note justifying the action. TR 755. Usually, unless there is clear evidence of a continuing illness or incapacitation, such as a hospitalization, an employee is expected to call for each day he is sick. TR 1753. While it is unclear when it started, it is also clear the Saporito was given, at the request of Mr. Greg Verhoeven, his immediate supervisor, special "one-person" job assignments because other journeymen in Verhoeven's crew did not like to work with him. TR 1378-9. Saporito also allegedly did two jobs incorrectly which came to management's attention. TR 1891-4. In any event, on May 4th, while under the scrutiny of an INPO team evaluating the Maintenance Department's operations, a job assigned to Saporito resulted in a confrontation between Saporito on the one hand, and the Production Supervisor, Harley, and the Maintenance Department Head, Daniel Tomaszewski, on the other, regarding what procedural steps were necessary to carry out the work order. The job was eventually assigned to another technician, Mr. William Dinan. TR 1895-9, TR 1743-7. There was also a confrontation regarding the propriety of a "meal ticket" submitted by Complainant for reimbursement. One is entitled to a "prepared meal" if one works a certain period beyond one's scheduled work shift. Saporito submitted a supermarket receipt which was not reimburseable. TR 1736.

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When Saporito protested that the practice was allowed at St. Lucie, a check with that plant revealed he had been embroiled in a similar situation there and rebuffed. T P, 1888-90. There was testimony from some employees that this requirement is overlooked at times. TR 2152.

On May 9, Saporito wrote to the INPO evaluation team alleging that there were various inadequacies in the I & C Department and that Harley was not "technically

competent" to fulfil his functions. RX 51. Various others, including Mr. Joseph Kappes, the Maintenance Department Superintendent, were copied.

On the morning of Monday, May 9th, Tomaszewski, after reviewing during the weekend the events in which Saporito was involved over, the prior two weeks, brought his concerns to Kappes and noted that discipline was warranted. TR 1902-4. He prepared three reports of discipline (ROD's) and a meeting was convened with Saporito, several job stewards, and Kappes, Tomaszewski, Harley and Verhoeven. TR 100. Kappes, who ran the meeting, alleges this was decided before he learned of the INPO letter. TR 1972. The above-noted episodes were reviewed. After counseling Saporito that insulting racial references would not be tolerated, the matter was dropped. TR 1979. Kappes also dropped the meal ticket issue, after further discussion. TR 1979-80. Sick leave was the subject of discussion, including alleged excessive absenteeism. TR 1906-7, 1981. Complainant's job performance was also discussed but continued to a future time in order to allow Saporito time to review the plant work orders (PWOs). TR 1982.

This meeting is alleged by Complainant as one of the first reactionary measures taken by FPL in retaliation for voicing his safety concerns. He became "a marked employee." (CB 18).

II

The summer witnessed several other meetings and confrontations. Some were continuances of the May 11th meeting. TR 1989-90. Kappes complained to Mr. John Odom, Site Vice President, about Saporito's conduct and explored the feasibility of firing him or transferring him

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elsewhere. TR 1995-6. During this same general period Saporito's bid on a job at the St. Lucie plant was denied, despite his being the senior qualified bidder, a violation of the bargaining agreement. Complainant alleges that this, too, reflects the continuing harassment he was subjected to during this period. TR 777-782. This is denied by FPL management. TR 1399-1400. Mr. Charles F. Leppla, the person at St. Lucie who had made the decision, testified that he was familiar with both Saporito and the other candidate, a Mr. Chuck Denning. After conferring with Tomaszewski, Leppla concluded that Denning was the better choice. Saporito was considered "borderline" insubordinate during his prior tour at St. Lucie. TR 1613-21.

On July 28th Complainant was ordered by Harley to take some readings in a containment area where temperatures were close to 120 degrees Fahrenheit. RX 133. The job was rotated among the department's personnel so as to spread the possible exposure to radiation and thus keep the dosage low for any one person. Saporito had zero exposure. TR 1761. Harley acknowledged that when Saporito left the containment area feeling ill, complaining he could have died in there, that he commented "Maybe he should have."

Harley disclaims that the assignment or the comment were motivated by Saporito's protected activity. TR 1766. The task had been assigned, to another individual the night before without incident. TR 1764. He viewed Saporito as one who "spent most of his time writing ("hung up on procedure") rather than working." TR 1762.

III

Complainant filed his first complaint with DOL on October 14th. RX 75. In it he alleges FPL management at Turkey Point Nuclear as "aggressively discriminating and harrasing (sic)" him because of protected activity, viz, a letter dated September 29th to NRC regarding the conduct of Mr. Bruce Koran. The four page letter was addressed to Kappes, copy to others including Odom, union leaders Robert Boyle. and Leonard Spring and to NRC. RX 68. In it Complainant recited four episodes where Koran, his immediate supervisor at the time, began shouting at him and gesticulating, including "pointing directly at [him] with his finger." Koran was accused of answering a telephone

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inquiry concerning Saporito's creditworthiness and, while acknowledging Complainant had worked for FPL for some years, suggested he may not continue to be employed if his conduct did not improve. TR 1697-8. In the letter, Complainant requested \$500,000.00 as compensation for damages and "Respectfully request[ed] that this employee [Koran] undergo extensive drug testing within the scope of the FPL Fitness for Duty Program and additionally this employee [Koran] should be psychologically evaluated to determine if his behavior warrants removal of his unescorted access to our nuclear facilities" RX 68, p.4. Complainant also suggested Koran's unescorted access to restricted areas be suspended until the evaluations were carried out and he is declared fit; alleging that he, Complainant, is concerned about the health and welfare of his fellow employees and the general public.

The incidents complained of were essentially confrontations where Koran became frustrated with Saporito's intransigence in several matters involving work procedures, interpretation of rules and work habits, and especially Saporito's rather indifferent response to instructions. TR 1669-1690. Koran acknowledged that he was out of line in speaking about Saporito as he did to the woman who identified herself as being from a credit union. TR 1697-8. Saporito identified the caller as a potential landlady from whom he was considering renting a room. He was offered the room, in any event. TR 1106-1114.

Saporito became embroiled in another confrontation a few weeks later with a FPL instructor, Robert Boger, on October 12th. The initial incident arose from a question Saporito put to Boger during a refresher class concerning the rule on wearing hard hats. Boger felt he was being admonished by Saporito for disagreeing with him. TR 1644. The following day Boger encountered Saporito discussing with another instructor the correctness of certain aspects of a test Saporito and the other employees had taken the

previous day. Although Complainant had passed he had returned to discuss certain aspects of the test. He had a right to do so. TR 1646. However, the discussion escalated to an argument during which Boger shouted obscenities at Saporito, following him out the door as Complainant retreated from the instructor's verbal onslaught. TR 802, 1647-1651. This

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"aberrant behavior" was reported to superiors at Turkey Point and was also reported by Saporito to NRC, as another indication of the harassment he was being subjected to and as support for his "concern" that management could not deal with the matter. He felt that the health and safety of the public required NRC intervention. RX 76.

On the same day, October 13th, Complainant received a written warning for excessive absenteeism. He believed this to be a form of reprisal for his earlier protected activity. TR 819-21, 885. The record shows, however, that the subject of the disciplinary meeting was not unique to Complainant. TR 316-7, TR 667, 1779.

The Koran and Boger episodes were each subjected to a rather thorough investigation by the Turkey Point Quality Assurance Department which concluded that neither individual constituted a threat. Each was recommended for further training: Koran in being a supervisor dealing with "difficult" employer/employee relations; Boger in dealing with confrontational situations. RX 77, 79.

IV

Odom, the Site Vice President, in view of the above events, concluded that an outside investigative team was necessary to review the situation at Turkey Point and report to him. After conferring with FPL officials he retained the firm of Stier, Anderson & Malone (SAM), attorneys who had performed a similar function elsewhere, charging them with the task of examining Saporito's charges of harassment and discrimination and his allegations concerning Boger and Koran. He also advised the NRC. TR 1420-33. Saporito refused to, cooperate unless his grievances were addressed. TR 1428. (Saporito, alone, had filed more, than 50% of the grievances filed at Turkey Point. TR 1433). Odom agreed to address them personally and arranged a meeting for November 23rd. On November 21st he learned for the first time that Saporito had nuclear safety concerns. The following day he learned that Saporito would not reveal to the Quality Assurance Superintendent what those concerns were. TR 1438. The next day, November 23rd, he began a virtually day long meeting with Complainant, union officials and others in an attempt to resolve the grievances. Late in the

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conference Odom raised the question of Saporito's nuclear safety concerns and asked him to disclose them. While acknowledging having such concerns, Saporito refused to divulge them, stating he would reveal them only to the NRC. Odom allegedly "directed" him to divulge them "now." He intended the inquiry to be an "order". TR 1438H-I. Chief Job Steward Boyle believed the request by Odom to Saporito not to have been an "order" and therefore Saporito was not insubordinate. TR 151-4. Odom later ordered Saporito to at least divulge his concerns to the NRC. TR 1438S. In response, Saporito demanded various stationery and office equipment and supplies to aid in preparing his report to the NRC and as a precondition to speaking to SAM. TR 1438I, RX 88. Of those present, neither Boyle nor Mathis felt the demand for supplies and equipment was reasonable. TR 369-70, 596-7.

Near the end of that same meeting Saporito also refused to divulge his safety concerns to Leonard Spring, President of the local union. TR 386. Later that evening, Kappes advised Odom that in view of Complainant's unwillingness to divulge safety concerns some job stewards approached him and expressed concern that Saporito might create a problem to justify his position. TR 388-9, 2015. It was suggested that Complainant be excluded from the plant's protected area. TR 390, 2017. Kappes took the suggestion to Odom and they agreed to restrict Complainant's access to vital areas. TR 1438N, 2017. Complainant still had access to the I & C shop which, while within the protected area, was not in a vital area. TR 2019.

V

On or about November 28th Odom contacted Mr. Oscar DiMiranda of the NRC regional office inquiring about any nuclear safety concerns DiMiranda may have learned from Saporito. He learned that while Saporito had contacted DiMiranda, he spoke in vague generalities; no specific concerns were divulged. TR 1438S. On November 29th many of the outstanding grievances were resolved. The principal one being an agreement (which Odom achieved by going, "over the head" of his St. Lucie counterpart [TR 1441-21]) to award Saporito the I & C Technician's job transfer to St. Lucie retroactively to July 16th, with reimbursement for

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commutation expenses sustained by the employee during the interim. TR 1230-41. This was designed to become effective December 17th, to enable Saporito to meet the SAM attorneys before he left Turkey Point. TR 1440.

On November 30th, Complainant met with the attorneys for about six hours, beginning at 9:30 a.m. TR 913-4. At about 5 p.m., Kappes told Harley to summon Saporito to meet with Odom to discuss his safety concerns. TR 1793, 2023-4. Odom learned Saporito was talking to the investigators. He decided this would be a good time to talk to Complainant to establish a protocol for Saporito's review of the records he had requested to document his safety concerns, to attempt to define a nuclear safety concern and to learn what those

concerns were. He felt a certain sense of urgency in ascertaining the precise nature of Saporito's concerns because he considered Saporito to be "not qualified to determine whether they're important or not." TR 1446. Believing Complainant to be scheduled to work until 7:30 p.m., he asked Kappes to summon him for the meeting. Kappes told Harley to fetch Saporito.

Harley approached Saporito at the I & C shop where Saporito was standing near another worker's bench speaking with several co-workers. When told of the meeting, Saporito declined, stating at first that he had no safety concerns. He later said he had personal family business to attend to. TR 1794: When Kappes was told of this he relayed the message to Odom who ordered him to tell Saporito he wanted him present for a meeting. Kappes approached Saporito as he was still standing, talking to his co-workers. TR 2025. Kappes leaned over a stool to tell him he was required to attend a meeting when Saporito turned and was startled. Kappes alleged, and I credit it, that no hostility was intended. When he told Saporito of Odom's summons, Saporito at first declined, stating again he had personal family business to attend to. TR 2025. When Kappes insisted he holdover for the meeting Saporito declined, saying he was "sick." TR 2027. There is a dispute as to Complainant's countenance when he made this later statement. Kappes testified:

It's what he did and then said. He looked me straight in the eyes, his whole body English (sic) changed, and he gave me one of those "I gotcha looks," and he said, "I'm sick." TR 2027.

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Saporito, while acknowledging he was standing ("leaning") by a work bench, as was noted by Harley earlier, and had at first given as an excuse, "personal and family matters" to attend to, testified he was feeling very poorly from the intensive examination he had undergone from the SAM attorneys earlier in the day. TR 916-20. Mrs. Rosemary Saporito testified her husband was ill on Thanksgiving Day the preceeding week, November 24th, and complained "of having stomach-type chest pains" when he got home the night of November 30th. TR 699, 705. Mr. Kyle Roberts was present during the Kappes-Saporito confrontation. While confirming Kappes' basic account of the episode, including the fact that Kappes warned Complainant he was making "a career decision" while ordering him to holdover several times, nevertheless, failed to see any "smile" on Saporito's face while giving his second excuse for failing to holdover. TR 2027. In any event, Kappes believed Complainant was lying to him and was being insubordinate in front of other employees. TR 2027-2028, 2044. Kappes left the shop and returned with Harley. He told Harley, in Saporito's presence, that Complainant had refused a direct order and told Saporito he was being suspended. He told Harley to walk Saporito to the gate and remove his plant access badge. TR 2028-9. The time to traverse the distance between the I & C Shop and Odom's office was one variously described as being less than one minute (TR 145) to "a couple minutes." TR 1255.

Complainant had not, earlier in the day, sought to be released-early from work due to illness. TR 1246-7. He did not seek aid at the plant, nor did he seek it on the way home, or in the Jupiter area. TR 924, 1258-9. He explained he was unfamiliar with medical facilities in the Miami area and that he had to stop along the road several times to rest. He knew when he got home his wife, a registered nurse, could help him. TR 923-4, TR 1259. He saw his doctor the next day. TR 1259.

After Harley escorted Complainant from the shop, Kappes reported what transpired to Odom and the union stewards who had assembled for the meeting. TR 2034. Odom, desiring to

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get to the bottom of the safety issue, instructed Kappes to put the suspension in abeyance, contact Saporito and get him back to work. TR 1453-4, 2034. This was done the next day. TR 2035. Saporito stated he was on sick leave until December 12th due to "medical disorders due to stress." TR 2035.

VI

On December 5th, Kappes called Complainant and told him that FPL was requesting him to be evaluated by a Company doctor concerning the medical disorder due to stress which he had reported and inquired whether the interrogation by the SAM attorneys could be continued in the Jupiter area. Saporito told him that he was not well enough to be interviewed and that he was declining the "request" to be seen by a Company doctor. TR 927-8, 1285. Odom advised union officials, Messrs. Sims and Boyle, that Saporito would have to see a Company doctor before returning to work to resolve two issues: the circumstances surrounding his refusal to holdover on November 30th; and his medical disorder related to stress. TR 428-9, 1457-8. He also told them if Complainant's and the Company's doctors disagreed, FPL and the union could select a third doctor to resolve the matter. TR 1458.

When Complainant returned to work on December 12th with a doctor's note excusing the absence, Kappes told him he had to see a Company doctor. Saporito refused, alleging he was being harassed due to protected activity. TR 2042, 436. This request was repeated on December 13th, citing as reasons: to ascertain whether Complainant had been too ill to hold-over on November 30th; and to see whether he was fit to return to his work as an I & C Specialist. TR 2046-7, 438. On the following day, at Complainant's suggestion, it was agreed that the respective doctors should confer and perhaps eliminate the need for the company-sponsored physical examination. TR 936. This hoped for resolution did not come to pass. Dr. Richard Dolsey, the FPL consultative physician, concluded he had to examine Saporito in order to give a properly informed opinion. TR 832.

On December 16th Kappes told Complainant that arrangements were made for the consultative physical

examination with Dr. Dolsey. Arrangements were made for a supervisor, Willis, to drive Saporito and a job steward, Robert Caponi. Saporito stated he would go to see the doctor but would not be examined. TR 2051, 443-4. Despite this answer, Kappes decided to send Saporito to Dr. Dolsey on the chance he might change his mind. TR 2052. Boyle advised Complainant to comply and then grieve. TR 451. At Dr. Dolsey's office Complainant refused to fill out the personal medical history form. TR 605, 1297. Complainant was accompanied by Caponi into the physician's examining room. TR 606. Willis remained outside in the reception area. TR 611.

Precisely what happened in the examining room is disputed to some degree. It is undisputed, however, that, upon Dr. Dolsey's arrival, Complainant told him that before anything else, he had some questions he wanted answered. TR 607-8, 834, 942, 1298. After answering a number of questions, he attempted to ask Saporito some questions and to examine him. Saporito would neither answer questions nor submit to an examination. Consequently, Dolsey asked Saporito and Caponi to leave. TR 834-6. During the course of this Dolsey entered and exited the examining room one or two times. TR 835, TR 939-43.

On December 19th Saporito explained his version of what transpired in Dolsey's office to FPL management, arguing that he did not refuse to be examined. He allegedly left the office on Dolsey's instruction. TR 943-4. However, when asked by Kappes as to whether or not he refused to be examined, Saporito answered "No comment." TR 1303. Kappes suspended Saporito effective immediately on December 19th. *Id.*, 2054. On December 22nd Saporito was discharged by John Odom for his (a) refusal to reveal his safety concerns to Odom on November 23rd, (b) refusal to holdover on November 30th to attend a meeting with Odom, and (c) refusal to undergo a physical examination by Dr. Dolsey. RX 104, TR 255.

Applicable Law

The parties agree that Complainant has the initial burden of establishing a *prima facie* case showing:

- (1) that the party charged with discrimination is an employer subject to the Act;
- (2) that the complainant was an employee under the Act;
- (3) that the complaining employee was discharged or otherwise discriminated against with respect to his or her compensation, terms, conditions, or privileges of employment;

(4) that the employee engaged in protected activity;

(5) that the employer knew or had knowledge that the employee engaged in protected activity; and

(6) that the retaliation against the employee was motivated, at least in part, by the employee's engaging in protected activity.³ Once the complainant establishes a *prima facie* case, the burden of proof shifts to the respondent to prove affirmatively that the same decision would have been made even if the employee had not engaged in protected activity.⁴

DISCUSSION AND CONCLUSIONS

My review of the record in this case convinces me that Complainant has failed to present a *prima facie* case. He failed to meet the sixth of the six elements necessary to establish his case. The probative evidence of record fails to show that the alleged discriminatory actions and eventual discharge were, motivated in any way by Complainant's protected activity, be it the INPO letter in May or the more recent allegations in the fall of 1988 beginning in September 20, 1988. CX 20. Even if one were to find, *arguendo*, that a *prima facie* case were established, it is obvious that the actions taken by FPL against Complainant starting in September 1988. were entirely warranted in Respondent's role as a manager and would have been pursued regardless of whatever protected activity Complainant may have engaged in. The individual actions of Koran and Boger shall be treated *infra* in greater detail.

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Complainant arrived at Turkey Point in April 1988 preceded by an unfavorable reputation, pertaining to his work habits, whether deserved or not. TR 574, 1752. This was not diminished when he called in sick on his first scheduled day at Turkey Point despite the fact he clearly had a good medical reason. TR 231. Respondent's management team did not require news of Saporito's letter to INPO to develop a hostile attitude when on May 4th, he delayed a job two hours in a confrontation with supervisors, a task someone else, less experienced, completed in one and one-half hours. TR 1743-7. All this transpired under the eyes of the INPO evaluation team. Daniel Tomaszewski, the I & C Department Head, summarized the situation thus:

I've never seen so many problems from what was supposed to be a six and seven year experienced journeyman in such a short period of time. TR 1899

Saporito gave as well as he received, being personally responsible for more than one-half of all the grievances filed at Turkey Point. TR 1433.

1. Turning now to the specific allegations made by Complainant in his complaints. The complaint filed on October 14, 1988 and its subsidiary letters dated October 31 and

November 8, 1988 were embraced in the determination of the Wage and Hour Division on November 18, 1988 and became the case docketed as 89-ERA-7. Essentially this group of complaints alleges that Complainant was the subject of retaliatory discriminatory practices, such as threatening behavior by Koran and Boger and disciplinary action for alleged infractions such as excessive absenteeism. The clear preponderance of the probative evidence demonstrates that these charges are not true. The Koran and Boger episodes were nothing more than arguments precipitated at least in part by Complainant's contentiousness. Both Koran and Boger contributed to the affair by their low tolerance for such behavior. Koran and Boger, each in his own way, displayed outrageous reactions to Saporito's conduct. Koran should not have vented his frustrations on the telephone to an unknown caller. Boger should not have shouted obscenities. Their conduct, however, was clearly not motivated in any way by whatever protected activity Complainant wishes to point to.

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The same holds true with regard to all the other alleged injustices suffered by Saporito regarding absenteeism, meal tickets and job performance, or assignments. While these may or may not be matters which Saporito might grieve successfully, the alleged injustices are not shown to be causally related to his protected activity. If the matters were dealt with by FPL management at a higher than usual level or in a slightly harsher than usual way, it was entirely due to the fact that Complainant constituted a greater than usual personnel problem. I credit the testimony of Koran, Boger, Harley, Kappes, Tomaszewski and Odom that their actions towards Saporito were in no way related to his protected activity. I observed their demeanor and studied their testimony. In this connection I note that Verhoeven, while characterizing management's treatment of Saporito as "not usual", admitted asking Harley to assign Complainant "one-person" jobs because others in Verhoeven's crew did not like to work with him. TR 1375-9. I conclude there is no persuasive evidence to support Complainant's charges. This conclusion is reached after a careful and sympathetic review of the record, recognizing the serious financial and professional straits in which Complainant finds himself.

2. The complaint of November 28, 1988 and the subsequent letters embrace the negotiations surrounding Complainant's unsuccessful attempt to transfer to the St. Lucie plant, his being given demeaning assignments due to his restricted clearance level, and his suspension and ultimate discharge. They are embraced in case No. 89-BRA-17. Complainant summarizes his position in his brief where he states:

At issue in this case is whether Complainant engaged in protected activity in accordance with 42 U.S.C. §5851 and as a matter of law, and whether the decision by FPL to terminate Complainant's employment was motivated by animus toward Complainant solely because of his engaging in protected activity, or for reasons not protected by this (Act). CB p. 3.

The record overwhelmingly supports Respondent's position that the denial of the St. Lucie transfer was a matter which was acted on long before the effective date of the first

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complaint and therefore outside the scope of this proceeding 42 U.S.C. § 5851(b)(1). Assuming this matter falls within the scope of the proceeding because it was still being negotiated in the fall of 1988 (a conclusion which is purely hypothetical), it is quite evident that the St. Lucie people, having had experience with Saporito, wanted nothing more of him. "Borderline insubordination. He lacked the willingness to work cooperatively with management and his peers. He intimidated his supervisors. He was very unproductive..." He filed: "Numerous grievances." TR 1615. These are the views of the individual who had been Complainant's supervisor at St. Lucie. TR 1610. The same individual, Charles Leppla, was instrumental in rejecting Saporito's attempt to return. TR 1613. I credit this testimony.

Complainant's access to restricted areas was withdrawn for very valid reasons entirely independent of his alleged protected activity. Ironically, his access was limited as a safety precaution. TR 388-9, 2015. I credit the reasons advanced by Kappes and Odom. Complainant's insolence towards Odom and Spring during the November 23rd conference properly gave his co-workers and supervisors reason to at least wonder, if not worry, about Saporito's future conduct. The record also makes it clear that Complainant's preoccupation with procedures led the Production Supervisor to give him assignments which enabled him to work alone because "nobody wanted to work with him". TR-1752.;

The last matters for consideration are the series of events which culminated in Complainant's discharge. Responde cites three basic episodes, Complainant's:

- (a) refusal to divulge his safety concerns to Odom on November 23rd,
- (b) refusal to holdover to meet with Odom on November 30th, and
- (c) refusal to submit to a physical examination by a licensed physician chosen by FPL.

My review of the record convinces me that the reasons given by Respondent for the discharge are sincere and valid

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in the circumstances and were in no way motivated by Complainant's protected activity. Again, ironically Respondent could not, consistent with safe and sound management practices, tolerate insolence manifested by the behavior of an employee who alleges safety concerns and fails to divulge them when asked, refuses to take a minute or two to explain to the Site Vice President why he could not attend a meeting and then refuses to

undergo a physical examination, scheduled by management in an attempt to ascertain whether the refusal to holdover was medically warranted and whether Complainant's medical condition was such as to warrant his return to an important and sensitive position in a nuclear power plant. TR 616-7. I shall review each of these in greater detail.

Saporito was asked by Odom at a formal meeting, in the presence of others to divulge his safety concerns and refused to do so. This is not controverted. The controversy is over whether the "request" was an "order." I credit the testimony of John Odom on this point. It was substantiated by Loretha Mathis, a witness called in behalf of Complainant who was largely favorable to Complainant yet who was not entirely uncritical of either Complainant or Respondent FPL. TR 513-4, 524.⁵ In addition, when one views the circumstances under which the request for information was made and the subject matter of the request--safety concerns in a nuclear power plant--one can readily understand Odom's chagrin and everyone's concern about Saporito's intentions and future conduct. Complainant's refusal constituted insubordination which, in my opinion, justified discharge. At the very least it certainly constituted a valid increment toward, the ultimate conclusion to discharge Complainant.

Complainant's refusal to holdover for a meeting with Odom on November 30th constituted an insubordinate act which warranted dismissal. I credit Odom's testimony that he felt a certain sense of urgency in ascertaining the precise nature of Saporito's concerns because he did not believe Saporito qualified to determine whether or not they were important. TR 1446. It is obvious he has a continuing obligation to search out an individual voicing safety concerns and to learn of their precise nature. I cannot imagine a responsible management person not wanting personally to be involved in such a situation. Leaving the matter to a government agency person

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(DiMiranda) located many miles away would reflect poor judgment, indeed. The question then arises as to whether Complainant's refusal to holdover was justified in the circumstances. I conclude it was not. As noted above, it is undisputed that the distance between Saporito's shop and Odom's office is trifling. TR 1255, 1451. Saporito was not lying down but standing when first seen by Harley and later by Kappes. TR 1794, 2025. Saporito testified he was "leaning" on his work bench. TR 918. The fact is also undisputed that he at first told Harley and Kappes that he had personal business to attend to. It was also undisputed that he was biding his time until quitting time. TR 919. These circumstances coupled with the fact that he had, both prior and subsequent to this, failed to seek any medical attention or assistance at the plant but elected to drive the extended distance home, regardless of whether he stopped along the way, fail to support his contention. This seriously undermines the credibility of Saporito's testimony. I also note that while Complainant alleges that the condition was long-standing, and said this to Dr. Klapper on December 1st, he had not sought medical treatment for the condition at any earlier date and according to Dr. Klapper, "had absolutely no sign of having any problems with gastritis during that period (August 1988) or in the following months until

he presented to my office on December 1, 1988". ex 90, P. 11. I do not credit the testimony by Complainant on this point, that is, of being too sick to attend a meeting with Odom. it challenges common sense. It was contemptuous conduct towards a management official who had made a legitimate request. To argue that regular hold over rules dealing with job completion situations apply in the instant circumstance is obviously a specious argument not worthy of further comment.

Lastly, we come to the episode surrounding FPL's efforts to require Saporito to undergo a physical examination for the reasons cited above and Saporito's reaction thereto. As I review the circumstances, I find it strange that an individual who urged that a co-worker at Turkey Point "undergo extensive drug testing ... [and be] psychologically evaluated" to ascertain his fitness to continue to function at the plant, should then balk when the tables are turned. TR 1295, RX 68, p. 4. In any event, the record clearly establishes that Saporito knew of the purposes of the physical examination. TR 1287-8, 1308. The union had advised him to comply with the order and grieve through established bargaining procedures. TR 1289. Yet,

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Complainant stated before leaving for Dr. Dolsey's office that he would go but refuse to be examined. TR 1295-6. That he intended to carry out his purpose is supported by his refusal to even make out the personal history medical form handed to him on his arrival. TR 605.

Complainant argues on brief that "Dr. Dolsey never requested to examine Complainant nor did the doctor indicate that an examination was required as Complainant was never asked to undress or even unbutton his shirt." CB p. 47. Dr. Dolsey testified Complainant not only refused to be examined but refused to answer questions preliminary to the examination. TR 834-6. I credit this testimony. Dolsey appeared to be a credible witness. He answered questions forthrightly. Although he performs examinations for FPL for pay, this constitutes a small percentage of his overall practice. TR 850. Caponi, while stating that Dr. Dolsey dismissed them from his office, also testified that Dr. Dolsey told Complainant: " ... [I]t's obvious that you won't let me examine you. And Tom (Saporito) said, well, I still have some more questions to ask." TR 611. Viewing this statement from a witness who was obviously biased in favor of Complainant and who appeared to be evasive, especially on cross-examination, in the light of Dolsey's testimony, the earlier admissions of Saporito regarding his intentions not to be examined and the overall circumstances surrounding the visit to the physician's office, one cannot come to any other rational conclusion. Saporito, true to his earlier word, went to "see" the doctor but not to be examined, and, in fact, refused to be examined. To come to any other conclusion would require a sort of sophistry with which I am not familiar. Complainant's argument that the examination was part of a conspiracy has no probative basis in the record.

Ultimate Findings and Conclusion

I conclude, therefore, that Complainant has failed to present a *prima facie* case. The actions taken against Complainant by FPL and its management personnel were a result of his contentiousness and recalcitrance as an employee. Saporito's discharge resulted solely from his crossing the line from contentiousness and recalcitrance into the area of insubordination. Furthermore, the insubordination impacted on the Site Vice President's grave responsibility to assure that the nuclear facility over which he holds jurisdiction operates

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safely. I was impressed by how solemnly this responsibility is shared by the other employees, both union and non-union, who testified.

For the foregoing reasons, it is Ordered that the complaints be Denied.

ANTHONY J. IACOBO
Administrative Law Judge

Dated: June 30, 1989

Boston, Massachusetts

[ENDNOTES]

¹Counsel for the International Brotherhood of Electrical Workers were allowed to participate only insofar as to be available to confer with witnesses who were union members.

²A pre-hearing conference was held in Miami on January 5, 1989 before another judge who later recused himself.

³*DeFord v. Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1983); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984); *Ledford v. Baltimore Gas & Electric Co.*, 83-ERA-9, slip op. ALJ at 9 (Nov. 29, 1983), adopted by SOL.

⁴*Ashcraft v. Univ. of Cincinnati*, 83-ERA-7, slip op. of SOL at 12-13 (Nov. 1, 1984); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1164 (9th Cir. 1984); *Consolidated Edison of N.Y. Inc. v. Donovan*, 673 F.2d 61, 62 (2nd Cir. 1982).

⁵Ms. Mathis and several other employees made vague references to alleged retaliation by FPL when safety concerns were voiced in the past. These were rather vague and not convincing.